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December 31, 1992

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues
Docket No. 92-259

Dear Ms. Searcy:

On behalf of Malrite Communications Group, Inc., we are filing herewith an original and four copies of its "Comments" with respect to the above-captioned docket.

Also enclosed are five copies of its "Comments", individually addressed for the Chairman and the Commissioners.

Should any questions arise with respect to this matter, please contact the undersigned counsel.

Respectfully submitted,

MALRITE COMMUNICATIONS GROUP, INC.

John M. Schohl
Secretary and General Counsel

JMS:cab
Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	Docket No. 92-259
	)	
	)	
Broadcast Signal Carriage Issues	)	

COMMENTS OF MALRITE COMMUNICATIONS GROUP, INC.

I. INTRODUCTION

Malrite Communications Group, Inc. ("Malrite") hereby files the following Comments on the Commission's "Notice of Proposed Rulemaking" (the "Notice") in the above-captioned proceeding.

Pursuant to the Cable Television Consumer Protection and Competition Act of 1992 (the "Act"), the Commission has issued the Notice seeking comment on the adoption of implementing regulations relating to mandatory television broadcast signal carriage ("must carry") and retransmission consent.

Malrite owns and operates four television stations and ten radio stations. Its television stations serve the Cleveland, Cincinnati, West Palm Beach, and Puerto Rico markets. Malrite also has owned and operated cable systems and, as a result, has an insight into the relationship between cable and the television industry.

The Notice seeks comment on a wide ranging number of topics concerning must carry, retransmission consent and the current rules affected by the Act. These Comments respond to many of the issues raised by the Commission and, through the Comments, we offer our perspective as a Company that has been both a television station and cable system owner and operator.

II. MUST CARRY

A. Definition of a Television Market

Section 614(h)(1)(C) of the Act provides that a broadcast station's market shall be the same as the station's Arbitron Area of Dominant Influence ("ADI") market. Because the television ratings for the ADI are used by many television stations to sell advertising time, there is a very logical justification for using the ADI as the market within which stations can expect carriage on cable systems.

The Commission has asked, as a preliminary matter, how changes in the definition of the ADI by Arbitron should be reflected in the rules. Our view is that the definition of local television market for purposes of Section 614 should be adjusted within 90 days of a change by Arbitron in their definition of ADI. Normally, Arbitron makes any changes on an annual basis. This will give the affected cable systems ample time to adjust their system lineup accordingly.

Another issue is how to treat markets outside the continental United States, for which Arbitron does not have ADIs. Because there are relatively few such markets, the best approach is on a case by case basis. Malrite operates two television stations in Puerto Rico, one of which is a satellite station for the other. The Puerto Rican market's equivalent of Arbitron is Mediafax. Mediafax provides audience ratings on an island-wide basis and the major television stations on the island, such as Malrite's, sell

advertising based on the island-wide ratings. In essence, Mediafax's "ADI" is the entire Commonwealth of Puerto Rico. We believe that, for purposes of Section 614, Puerto Rico should be considered the broadcasting station's "market" for all stations licensed to Puerto Rico and request that this be reflected in the rules adopted pursuant to the Notice.

B. **Modifications to a Station's Market**

Section 614(h)(1)(C) permits the Commission to add or subtract communities from the station's television market. The Commission, in its Notice, asks whether requests for changes can be made by both the broadcast station and the cable operator. Although we believe that it is appropriate to allow either party to seek modifications to a television market, the procedures followed should be different depending on whether there is a request before the Commission to expand or to contract the size of the market.

The Act was passed to provide local stations with the assurance, under most circumstances, that they would be carried on the cable systems in their "market." Congress has defined the market as the Arbitron ADI, a definition which, as stated above, is consistent with what the station uses as its market for the purposes of selling advertising time. Any reduction in the size of this area should be made only upon a conclusive showing that the contraction will not be detrimental to the station or the residents of the area in question. With respect to any addition to the market,

although the burden should be on the station seeking the addition to prove the necessity for the expansion of the market, the showing should not be as great.

The Commission has proposed to require parties requesting a modification to the size of the television market to file under the provisions of Section 76.7, procedures for petitions for special relief, rather than the rulemaking procedures in Part 1, Subpart C. We believe that Section 76.7 is the appropriate procedure to follow in order to provide the parties with expedited relief, however, great care should be taken to prevent the use of expedited procedures to shrink a television station's market in such a manner as to harm the public and local broadcast stations. The adverse consequences to a station, depending on the extent of the reduction, could be very severe. Because of the high percentage of cable penetration in most markets, the lack of carriage on cable systems in a station's local area could have a significant negative impact on its ratings, which in turn will reduce its revenues. The principal purpose for the enactment of the must carry rules by Congress was to prevent cable operators from deleting local broadcast signals with the intent of shifting advertising revenues from broadcast to cable television systems.[1] A significant reduction in the size of a market seriously undermines the basic tenet of Section 614.

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[1] House Committee on Energy and Commerce, H.R. Ref. No. 862, at p. 3, 102d Cong., 2d Secs (1992) ("Conference Report")

If a party desires to seek a reduction in the size of a market, it should be required to provide substantial evidence that it is warranted. Even though the procedure to be followed is an expedited proceeding, the Commission should only grant a modification to a market which reduces the size of the market upon a showing that the change will not have a material adverse effect on the public and broadcast stations in the market. There should be ample time given to all parties, particularly the residents of the communities affected, to respond to the petition.

With respect to matters that should be taken into account in considering changes to a station's market, Section 614(h)(1)(C)(ii) sets forth certain factors. Each of the factors enumerated focus on the extent to which the station does or does not have a presence in the community sought to be added or deleted. The most important factor, and the one which should be given the greatest weight, is whether the station provides programming which is of interest to the community, be it news, sports, special interest or any other programming. Evidence of the level of interest can be obtained through ratings surveys (i.e., data on all households, just cable households or just non-cable households) or general surveys of the residents of the community. Because the burden is on the party seeking the modification, latitude should be given to the applicant to provide all information it deems relevant. Unlike the rigid rules for proving

significantly viewed status, which rules, because of their inflexibility, have historically created unfair anomalies,[2] the procedures adopted for Section 614(h)(1)(C) requests should give the applicant the opportunity to present any data it deems relevant to support its request. It is then the Commission's responsibility to take such data and give greater consideration to the information that is consistent with the factors enumerated in Section 614(h)(1)(C)(ii).

The Commission has asked whether other factors should be taken into account, such as the distance a station is located from the community, the station's over-the-air viewability in the community and the significantly viewed status of a station in a community. The distance that the community is from the station's city of license should be irrelevant. All markets are unique. A station located more than 100 miles away in a particular market could be providing significant local service to a community that may not be provided adequately by any

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[2] The Commission has issued a petition for rulemaking (RM No. 7613) on an amendment to the significantly viewed status rules (Section 76.54). The rulemaking proceeding was prompted by the request of a coalition of UHF television station owners led by Malrite. The rulemaking is intended to address the problem faced by over 175 UHF television stations which began operations prior to 1971, who, solely because of their date of commencement of operation, are subject to much stricter requirements to prove they are significantly viewed than stations who began operation after 1971. The rulemaking has been pending for over two years and, in the meantime, many stations are being unfairly denied the benefits of significantly viewed status solely because of the inadequacy of the rules to address their situation. In light of the factors enumerated by Congress in Section 614(h)(1)(C), this is a good time to reexamine Section 76.54.

other station. A mileage limit could prevent such station from being assured carriage on the cable system in that community and deny the residents in the community local interest programming. The station's over-the-air viewability should be considered a factor but the lack of over-the-air viewability should not preclude a station from proving it should be a must carry station in a particular area. Many aspects affect a station's over-the-air viewability in a community, particularly terrain, which have nothing to do with whether the station provides local service. Similarly, whether a station is significantly viewed by itself should not be relevant. The test for significantly viewed status, as noted above, is very rigid and narrow and doesn't necessarily reflect the presence of the factors which the Act has enumerated.

In point of fact, a station which is located many miles away and/or which is not capable of being viewed over-the-air may not be entitled to must carry status in the community, but the justification for not including the community in a station's market should have more to do with the programming it provides than with its location or signal propagation characteristics.

C. **Interplay Between Must Carry Rules and Other Rules**

An analysis of the definition of the market under the must carry rules naturally begs the question as to the effect that such definition has on other rules, which use the market

definition contained in Section 76.51. Such rules include territorial exclusivity, syndicated exclusivity, network non-duplication and compulsory copyright license rules.

Section 76.51 contains the list of Arbitron ADIs in the top 100 markets as it existed in 1970. Clearly, the list should be updated and, in the future, updated annually as Arbitron makes changes in its ADI list. The Commission, in its Notice, expresses its concern about the situation where a station is entitled to must carry status on the basis of its ADI at the same time that another station can request deletion of some portion of its programming because the applicable exclusivity and network non-duplication rules use the Section 76.51 market list. Our view is that there should be no need to conform the rules. The exclusivity and non-duplication rules should take precedence, so that a cable operator would be able to delete certain programming carried by a must carry station if there has been a proper assertion by another station of that station's exclusivity or non-duplication rights.

The primary basis upon which the exclusivity and non-duplication rules grant such rights is that it recognizes stations should be able to contract with program suppliers for exclusivity in its market vis-a-vis other stations. If a station pays for programming, it is not unreasonable for it to expect protection against other stations airing the same programming in the same market. Therefore, no changes should

be made to the exclusivity and non-duplication rules other than making sure that the Section 76.51 market list is annually updated to reflect any changes in the definition of the market. The fact that the market for must carry purposes may be different should not matter.

D. **Must Carry Procedural Requirements**

Section 614(b)(9) of the Act requires a cable operator to provide written notice to a local television station at least 30 days prior to either deleting or repositioning that station. Further, a cable operator may not delete or reposition a station during a ratings period. The Act is silent on whether the notice should also be given to subscribers. Because one of the principal findings in the Act was the importance of cable subscribers having access to local television stations[3], we believe that it is essential to require a cable operator to similarly notify its subscribers in writing at least 30 days in advance of any proposed deletion or channel repositioning of a local television station. Although there may be little a subscriber can legally do to prevent the deletion or repositioning, at least they are afforded an opportunity to express their opinion to the cable system prior to any changes taking place.[4]

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[3] See Conference Report at p.3.

[4] Although the Act provides that the notice must be given at least 30 days in advance, there is justification for requiring as much as 60 days advance notice to subscribers and the affected station. It could be argued that 30 days is not sufficient and, based on our experience, in most cases the cable operator, for its

Section 614(d) of the Act sets forth the procedure to be followed whenever a local commercial television station believes that a cable operator has failed to meet its must carry obligations. If a local station believes that a cable operator has failed to meet its Section 614 obligations, the station shall notify the operator, in writing, of the alleged failure and identify its reasons for believing that the operator is obligated to carry the signal or has failed to comply with the channel positioning requirements. The cable operator must respond in writing within 30 days of such notification. If a local station is not satisfied with the cable operators response or the cable operator fails to respond at all, the station may file a complaint with the Commission to obtain review of the alleged wrongdoing. Our view is that if the cable operator responds sooner than 30 days, the station should be permitted to file a complaint immediately without waiting for the expiration of the 30 day period.

The Commission, in its Notice, has asked whether there should be a time period within which the station must file a complaint with the Commission after it has received a cable operators written response. Because the procedural requirements are intended to be remedial in nature and for the benefit of broadcast stations, we believe that no time limit

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own internal purposes, will have made its decision more than 60 days in advance of the deletion or repositioning.

should be imposed. First, in most cases a time limit would be unnecessary because a station has every incentive to file a complaint immediately. The station is the party who will be harmed by the wrongful deletion or repositioning by the cable operator. Second, the station bears the risk that its case for wrongful deletion or repositioning will be weakened if it delays in its filing of a complaint. If a station chose to wait before it files a complaint, it must have a good reason to do so, such as being engaged in good faith negotiations with the cable operator for an amicable resolution. A time limit may force a station to file a complaint prematurely creating additional and unnecessary paperwork at the Commission. Nothing is served by requiring a station to file a complaint within a particular time period.

The Commission has also requested comment on whether it should apply the provisions of Section 76.7 (the special relief rules) to expedite complaints of wrongful deletion or channel repositioning. Because of the consequences to a broadcaster if the allegations made in the complaint are true, the expedited relief provided for under Section 76.7 is essential. We propose that instead of permitting the cable operator to submit its response to the complaint within 15 or 30 days after the complaint has been filed (as provided in 76.7), the cable operator be required to respond within 10 days. This is not an unreasonable requirement, given the fact that the cable operator will have already been given 30 days

to respond to the initial complaint sent by the television station prior to the filing of a formal complaint with the Commission. Finally, a decision by the Commission should be required to be issued within 30 days of the filing of the petitioners reply to the cable operators comments.[5]

III. RETRANSMISSION CONSENT

A. Scope of Definition of "Multichannel Video Programming Distributor"

The Commission has sought comment on the precise definition of "multichannel video programming distributor." The Act defines such distributor as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming (emphasis added)".[6]

Clearly, the definition is intended to be very broad and to encompass not only all existing technology but also distributors of future, as yet undeveloped, delivery systems. Logically, the definition should include operators of satellite master antenna television systems (SMATV). Such operators are involved in the distribution of multichannel

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[5] The Commission notes that Section 8 of the Communications Act of 1934 requires parties filing requests for special relief in the cable area to pay fees. Because the procedures set forth in Section 614(d) of the Act are remedial in nature, we believe that the special relief request should be treated as an enforcement action and the fee requirement waived.

[6] 47 U.S.C. Section 522(12).

video programming to the same extent as the examples enumerated in the definition. The position that SMATV operators are covered by the Act is also consistent with the definition of multichannel video delivery services for purposes of the Commission's effective competition rules.[7]

The next question is what entity bears the responsibility for obtaining retransmission consent from broadcasters? The Commission cites an example in which an entity, a microwave common carrier, provides the delivery service and another separate and distinct entity, a cable operator, sells the service to subscribers. The Commission postulates that the responsibility should fall on the cable operator. We agree.

The definition of "multichannel video programming distributor" focuses on the person who makes the service "available for purchase by subscribers or customers." Thus, the definition seeks to hone in on the entity that interacts directly with the public. This entity is also the last link in the chain that brings the broadcast signal into a subscribers home via a multichannel service and would likely have the most control over whether or not the signal is

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[7] 47 C.F.R. Section 76.33. "Video delivery services ... include a competing cable system, a multichannel, multipoint distribution system (MMDS), satellite master antenna television (SMATV), home satellite dishes (HSO), and direct broadcast satellite services (DBS)" (emphasis added) 47 C.F.R. Section 76.33(a)(2)(ii).

ultimately included in the subscribers "program package".[8] Thus, the cable operator should be the party responsible for obtaining retransmission consent from broadcast stations.

B. **The Scope of Retransmission Consent**

The Act requires every commercial television station, within one year of the date of enactment (October 6, 1993), and every three years thereafter, to elect either must carry rights under Section 614 or retransmission consent rights.[9] The Act provides that if there is "more than one cable system that services the same geographic area, a station's election shall apply to all such cable systems."[10] In this provision, Congress appeared to focus on situations in which two systems service the same geographic area. The Commission aptly points out in its Notice that two systems' service areas may overlap but not necessarily be identical. The question in this situation is what degree of overlap must there be to trigger the "same election" requirement.

One justification for the same election requirement appears to be to prevent a broadcast station from favoring one

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[8] Because the Act makes no distinction between television and radio broadcasting in the context of retransmission consent but does make the distinction in other sections, we conclude that the drafters of the Act intended that the retransmission consent requirement apply to the retransmission of television and radio signals. We believe a separate rulemaking should be instituted to propose rules governing the retransmission consent of radio broadcast signals.

[9] 47 U.S.C. Section 325(b)(3)(B).

[10] Id.

system over another by electing must carry on one system and then approaching the competing system and insisting on compensation for the granting of retransmission consent. The station, already assured of carriage on one system could theoretically use this as leverage against the other system in negotiating retransmission consent. If several local stations used the same approach, the competing system could be put at a serious disadvantage in obtaining attractive stations for its program service. With the same election requirement, however, the broadcast station would have to either elect must carry on both systems and assure itself of carriage or elect retransmission consent rights on both and take the chance that at least one system will carry it. In either event, the two systems are treated the same and no system gains an advantage as a result of the station's election.

In a situation where there are overlapping service areas but the overlap is not significant, the rationale for the same election requirement is not as strong. Indeed, if there is no overlap threshold that must be met to trigger the same election requirement, it is possible that a broadcaster could be forced to make the same election for all systems in its market, a result clearly not contemplated by the Act. A possible test as to whether the same election requirement is present would be to analyze, for a particular system (call it the "dominant system"), at the time the election must be made, whether there is another system (call it the "alternative

system") that serves at least 20% of the households in the dominant system's service area. If so, the same election must be made for both. The definition of "serves" would be subscribes to the alternative system.[11]

As a procedural matter, all stations would be required to acquire information from each multichannel distributor in its market as to whether such distributor serves an area which is also served by another distributor and, if so, the extent of the overlap. The station, absent contrary information, would be able to rely on the information provided by the system. If the system does not provide the information, the station should be permitted to assume that the overlap, if any, does not meet the 20% threshold and that the same election requirement is not present.

C. **Implementation of Retransmission Consent**

The Act provides that the Commission must "issue regulations implementing the requirements of Section 614 within 180 days of enactment."[12] The Commission, in its Notice, has proposed to allow a limited amount of time for cable systems to come into compliance with the new must carry rules. We believe that a period of 30 days from enactment of

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[11] The test essentially examines whether there truly are two competing systems in a particular community. This is consistent with the House-Senate Conference Report which states that "in situations where there are competing cable systems serving one geographic area, a broadcaster must make the same election with respect to all such competing cable systems" (emphasis added). See Conference Report at p. 76.

[12] Section 614(f).

the rules would provide systems reasonable time to conform. Because the FCC must carry rules will merely amplify and/or clarify the provisions of the Act, much of what is enacted by the Commission should not come as a complete surprise. Most systems should have already begun preparations for the date of effectiveness well before the rules go into effect.

The Commission has also advanced a proposal to require broadcasters to make their initial retransmission consent/must carry election prior to the October 6th effective date. A requirement to make an election in advance would be reasonable and allow the cable systems adequate time to notify their subscribers of any changes prior to the October 6th date. We suggest that the election deadline be August 23rd, 45 days prior to the retransmission consent provision date.[13]

The next issue is the consequences of the failure of a broadcaster to make an election by the deadline. Although unlikely, it is possible that a broadcast station could fail to notify a system of its election in a timely manner. In such event, the absence of an election should be deemed to be an election by the broadcaster to seek must carry rights under Section 614. This approach harms no one. The broadcaster receives the full rights accorded to it under Section 614 and the multichannel distributor is in the same position it would have been in had the broadcaster elected must carry by the

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[13] With respect to subsequent triennial elections, the same timeframe should apply, i.e., station must make election by August 23, 1996 for an October 6, 1996 effective date.

deadline. The only modification that would need to be made would be the channel position election. Without a timely election, the cable system should be free to choose the stations channel position from among the options available, i.e., the July 19, 1985 channel position, the January 1, 1992 channel position or the station's on-air channel.[14]

D. **Nature of Retransmission Consent Rights**

A broadcaster that elects retransmission consent is announcing its intention to have the carriage of the station's signal governed by the terms placed on the giving of that consent. The ultimate terms under which a broadcast station is carried on a system is, of course, subject to the mutual agreement between the broadcaster and the multichannel distributor. Implied in the Act's provision for an election between must carry rights and retransmission consent rights is that when a station chooses its retransmission consent rights it is choosing to forgo its rights under Section 614 in lieu of negotiating its own terms of carriage with a multichannel distributor.

As a consequence, the Commission's tentative interpretation that the provisions contained in Section 614 apply only to must carry stations appears to be accurate. The Commission, in its Notice, correctly notes that nothing prevents stations and cable operators from negotiating

[14] Of course, the cable operator would still be subject to Section 623(b)(7)(A)(i) which requires the operator to place all must carry stations on the basic service tier.

retransmission consent contracts that contain provisions identical to those in Section 614.

A station electing to assert its retransmission consent rights should, however, be entitled to take advantage of other protections afforded all stations, such as Section 76.62 (governing the manner in which broadcast signals are carried) and the general cable television technical standard rules. With respect to carriage of the complete program schedule of a retransmission consent station, we disagree with the Commission's interpretation that Section 76.62 does not require a cable system to carry the complete program schedule. The section provides that "programs broadcast must be carried in full" (emphasis added) by the cable system. The term broadcast could be interpreted to refer to the airing of the program by the station not the carriage of the signal by the cable system. If so, under Section 76.62, the cable operator is required to carry in full all programs broadcast. The import of the section is largely to prevent a cable operator from deleting portions of a particular program in order to insert its own commercials or promotional material. Therefore, a cable operator must carry all programs of a station regardless of whether the station is being carried pursuant to Section 614 or the retransmission consent provision.[15]

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[15] Although it is recognized that a broadcaster could conceivably contract away its rights under 76.62, there should be a strong presumption that a broadcaster is entitled to have its entire program schedule carried.

A related issue is to what extent does a signal carried pursuant to retransmission consent count against the must carry signal compliment. We believe that if a cable system is permitted to count retransmission consent signals for Section 614 purposes, that the entire signal must be carried as if it were a must carry signal.

IV. **CONCLUSION**

In October 1992, the United States Congress overwhelmingly enacted, on a bipartisan basis, a measure which is designed to assure the public continued access to local broadcast stations, and end the unfair subsidy of cable systems by local broadcasters, which has resulted in a competitve imbalance between the cable and broadcasting industries. The rules and regulations implementing the provisions of the Act should, of course, be consistent with the Act and its findings. The Commission and its staff ~~has~~ have been given a major task by Congress to implement the vital provisions of the Act and, as evidenced by the Notice, the Commission has proven that it intends to be thorough and vigilant in carrying out its responsibilities.

Respectfully submitted,

MALRITE COMMUNICATIONS GROUP, INC.

By: _____
John M. Schohl
Secretary and General Counsel

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IV. **CONCLUSION**

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